

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Complaint of
The Office of the Ohio Consumers'
Counsel, et al.,

Complainants,

v.

Interstate Gas Supply, Inc.

Respondent.

Case No. 10-2395-GA-CSS

PUCO

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INTERSTATE GAS SUPPLY, INC.'S PARTIAL MOTION TO DISMISS

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-9-01(C), Interstate Gas Supply, Inc. ("IGS") respectfully requests that the Commission dismiss multiple counts of the Complaint filed in this proceeding by the Office of the Ohio Consumers' Counsel ("OCC"), Northeast Ohio Public Energy Counsel ("NOPEC"), Border Energy, Inc. ("Border"), Stand Energy Corporation ("Stand") and Ohio Farm Bureau Federation ("OFBF") collectively "Complainants", in the above captioned proceeding. Specifically IGS asks that the Commission dismiss the First Claim, Fifth Claim, Ninth Claim, Tenth Claim, Eleventh Claim and Twelfth Claim in the Complaint for failure to state a claim upon which relief can be granted, pursuant to Ohio Rule Civ. Pro. 12(b)(6) and for failure to state reasonable grounds for complaint pursuant to Ohio Revised Code ("R.C") R.C. 4905.26. The reasons for this Motion are more fully set forth in the attached Memorandum in Support.

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Respectfully submitted, *per Matthew White msu*

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**MEMORANDUM IN SUPPORT OF
INTERSTATE GAS SUPPLY, INC.'S PARTIAL MOTION TO DISMISS**

I. INTRODUCTION

This proceeding was initiated on October 21, 2010 by the filing of a complaint against IGS ("Complaint"). In the Complaint, Complainants make twelve claims alleging IGS has violated various Ohio Statutes and Commission rules.¹ IGS disputes all of the claims in the Complaint as the claims are not supported by the law or facts. However, in light of the plain language of the Ohio Revised Code and the Ohio Administrative Code, and the Commission's Entry on November 10, 2010 in Case No. 02-1683-GA-CRS, the Complainants have failed to state a claim upon which relief can be granted and have failed to set forth reasonable grounds for complaint as required by R.C. §4905.26 with respect to the First Claim, Fifth Claim, Ninth Claim, Tenth Claim, Eleventh Claim and Twelfth Claim.

¹ See Complaint at pp. 10 through 19.

The First and Fifth Claims allege that IGS is marketing without a certificate that authorizes its use of the Columbia Retail Energy ("CRE") service mark. Applicable law clearly does not require IGS to obtain a separate certificate to market with the CRE service mark, nor does it require that each trade name a supplier uses be listed on its certificate. Rather, only that a notice of material change be filed. See 4801:1-27-10(B) O.A.C. The Commission has further confirmed this in its November 10, 2010 Entry, in Case No. 02-1683-GA-CRS ("Entry"), at paragraph (3).

The Eleventh Claim is speculative, only alleging that IGS *may* receive preferential treatment from Columbia Gas as a result of the licensing agreement between IGS and NiSource Retail Services, Inc. ("NiSource").

The Ninth and Tenth Claims allege that IGS' use of the CRE service mark, in and of itself, will cause confusion to customers. However, in light of the Commission's approval of the use of the utility service mark by multiple suppliers in Ohio, as well as the recent Entry in IGS' certification docket, these Claims are not credible.

Finally, Complainant's Twelfth Claim is simply not a claim, but rather states an argument evidently to be presented by Complainants as support for their other claims.

II. ARGUMENT

A. IGS is not Required to Receive a Separate Certificate Authorizing it to market under the CRE service mark.

In their First Claim, the Complainants allege that "the PUCO has not issued a Competitive Retail Natural Gas Marketer Certificate that permits IGS to use the trade name 'Columbia Retail Energy.'"² In the Fifth Claim the Complainants allege that the CRE marketing material does not "state that IGS has a Competitive Retail Natural Gas

² Complaint at 11.

Marketer Certificate issued by the PUCO to engage in marketing activities using the Columbia Retail Energy trade name and Columbia logo.”³ These allegations assume IGS is required to have a separate certificate to market under the CRE service mark or the certificate itself must indicate each trade name that IGS operates under. There is no reasonable basis for this assumption and such claim contradicts clear law, rule and Commission precedent.

On August 10, 2010, a renewal certificate was issued to IGS in IGS’ certification docket, Case No. 02-1683-GA-CRS (“Certification Docket”), which clearly authorizes IGS to provide natural gas service to customers through July 24, 2012. The Complainants cite no statute, rule or precedent that requires a certified supplier such as IGS to receive additional certification or notation on its issued certificate when marketing under a new trade name. To the contrary, it is common practice for natural gas marketers to use a trade name that is not independently authorized in the certification docket of the supplier or specifically noted on the certified supplier’s certificate. A cursory review of other Ohio certified suppliers’ certificates shows that the Commission has never listed each trade name under which a certified supplier operates on the certificate; only the applicant’s legal name is listed.⁴

³ Complaint at 12-13

⁴ Duke Energy Retail Sales, LLC’s trade names Duke Energy Retail Sales, Duke Energy Retail, and DERS are not listed on the CRNGS certificate. PUCO Case No. 10-0880-GA-CRS (Last certificate issued September 14, 2010) Glacial Natural Gas, Inc.’s trade name Glacial Energy is not listed on the CRNGS certificate. PUCO Case No. 10-642-GA-CRS (Last certificate issued June 14, 2010). UGI Energy Services, Inc.’s trade names GASMARK and POWERMARK are not listed on the CRNGS certificate. PUCO Case No. 02-1968-GA-CRS (Last certificate issued November 19, 2008). Metromedia Energy, Inc.’s trade names Metromedia Energy Northeast and Energy Express, Inc. are not listed on the CRNGS certificate. PUCO Case No. 02-1926-GA-CRS (Last certificate issued November 19, 2008). Gateway Energy Services Corporation’s trade names Gateway Power Services, Econnergy Energy Company, Gateway Energy Services, Ltd., and Mirabito Gas & Electric are not listed on the CRNGS certificate. PUCO Case No. 02-1908-GA-CRS (Last certificate was issued November 19, 2008).

Dominion Retail's recent notification of the use of a new trade name underscores this point. On October 15, 2009, Dominion Retail Energy filed notice with the Commission that it would be marketing under the trade name "Dominion Energy Solutions."⁵ Dominion Retail then proceeded to market under the trade name "Dominion Energy Solutions" for nine months before a new certificate was issued to Dominion Retail. Further, a renewal certificate was issued only because Dominion Retail filed a standard renewal certificate application. When the certificate was issued, the name "Dominion Energy Solutions" was not included on the renewal certificate, nor were the other trade names under which Dominion Retail does business.⁶

IGS' Notice of Material Change filing in Case No. 02-1683-GA-CRS on August 6, 2010 is all that is required by law for IGS to begin marketing under the CRE service mark, as evidenced by the common practice accepted by the Commission. This is supported by 4901:1-27-10(B) of the O.A.C. which only requires a material change filing for "use of a fictitious name." If more was required the O.A.C. would so state. However, even assuming, *arguendo*, that IGS' Material Change filing did require Commission consideration once a notice is filed, then the rules that relate to certification timing would also apply.

O.A.C. 4901:1-27-06(A) provides "if the commission does not act upon an application within thirty days of the filing date, the application shall be deemed automatically approved pursuant to section 4929.20 of the Revised Code on the thirty-first day after the official filing date." (Emphasis added). IGS filed its Notice of Material

Dominion Retail's trade names Dominion East Ohio Energy and Dominion Energy Solutions are not listed on the CRNGS certificate. PUCO Case No. 02-1757-GA-CRS (Last certificate issued July 14, 2010).

⁵ Case No. 02-1757-GA-CRS, Notification of Material Change (October, 15, 2009).

⁶ Id. Dominion Retail Renewal Certificate (July 14, 2010).

Change on August 6, 2010. The Commission did not act upon the Notice within thirty days of its filing. Therefore, in accordance with R.C. 4929.20 and O.A.C. 4901:1-27-06, IGS' material change was approved by operation of law and IGS was authorized to begin marketing under the CRE service mark on September 6, 2010.⁷ By its own assertion in the Complaint, the Complainants assert that IGS did not begin using the CRE trade name in the market until September 17, 41 days after the notice was filed. (Compl. ¶ 21)

IGS is not required to receive a separate certificate to market under the CRE service mark, and even assuming IGS' notice of material change filing triggered the Commission's renewal certificate rules, then IGS became authorized to market under the CRE service mark thirty days after the Notice of Material Change was filed. Accordingly, the Complainants First Claim and Fifth Claim (which are based on the assumption that IGS must have a separate certificate to market with the CRE service mark) fails to state a claim upon which relief can be granted and therefore states no reasonable grounds for complaint, and should be dismissed.

B. The Use of the Utility Service Mark is Not In and Of Itself Confusing to Customers.

The Ninth Claim alleges that "customers are unable to differentiate between mail they receive from Columbia -the gas company - and Columbia Retail Services - the Columbia affiliate - and Columbia Retail Energy --the non-affiliate."⁸ The Tenth Claim alleges that IGS is engaged in anticompetitive behavior by using the CRE service mark because the similar name and same logo will cause customers to confuse IGS with

⁷ While IGS does not believe it was necessary to wait 30 days after the filing to use the CRE service mark, out of abundance of caution IGS did not use the Columbia Retail Energy trade name in the market until after September 6, 2010, allowing the full 30 days to expire.

⁸ Complaint at 17.

Columbia Gas.⁹ Stripped to bare bones, the Complainants are alleging that any use of the utility name by a natural gas supplier (whether affiliate or non-affiliate) will cause confusion to customers.

Despite the Complainant's claims, the Commission has authorized affiliate marketers to market under the utility name for over ten years.¹⁰ In addition, O.A.C. 4901:1-29-05(C)(8)(f), recognizes that the use of the utility name is proper as long as appropriate disclosures are made. Finally, in ruling on the claims in IGS' certification docket that are almost identical to the claims being made in the Complaint, the Commission found "it is appropriate for IGS to use disclosures" on the CRE marketing material and directed "IGS to continue to work with Staff to ensure proper disclosures were used".¹¹ Implicit in the Commission's statement is that IGS is authorized to market under the CRE service mark, as long as IGS uses the proper disclosures. . Accordingly, there are no reasonable grounds for the allegations that IGS' use of the CRE service mark is unlawful in and of itself, irrespective of the disclosures used.

C. The Eleventh Claim Only Posits a Possible Harm and is Therefore Not Ripe.

The Eleventh Claim alleges that IGS is engaged in anticompetitive action by entering into a licensing agreement with NiSource "because Columbia now has a financial incentive that may cause it to favor IGS over other CRNGS." (emphasis added) This claim is about an alleged harm that may or may not happen. Speculation about events that may occur in the future does not create a justifiable controversy for

⁹ Id. at 18.

¹⁰ IGS would be no less than the sixth marketer to market under a name similar to the utility name, given the similarity of Dominion East Ohio Energy to Dominion East Ohio, First Energy Solutions to First Energy, Vectren Source to Vectren Energy Delivery, Duke Retail Energy to Duke Energy-Ohio and AEP Retail Energy to AEP-Ohio.

¹¹ Case No. 02-1683-GA-CRS, *Entry* (November 10, 2010) at Finding 7.

determination by this Commission. Accordingly, this claim is not ripe and it should be dismissed.

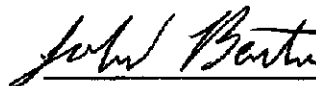
D. The Twelfth Claim is not a Claim.

The Twelfth Claim alleges that not using the CRE name or logo in the Dominion Choice Program indicates that IGS recognizes that the Columbia name and logo only has value in the Columbia territory. While this may be an argument that Complainants believe they can establish facts to support their other claims, it is in no way an independent claim. Accordingly, the Complainants have not set forth a claim upon which relief can be granted reasonable grounds for the Twelfth Claim do not exist and it should be dismissed.

III. CONCLUSION

The Complainants have not stated reasonable grounds for the First Claim, Fifth Claim, Ninth Claim, Tenth Claim, Eleventh Claim and Twelfth Claim of the Complaint and therefore IGS respectfully requests that these claims be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing *Memorandum in Support of Motion* was served upon the following persons listed below by electronic mail and regular U.S. Mail, postage prepaid, this 12th day of November, 2010.

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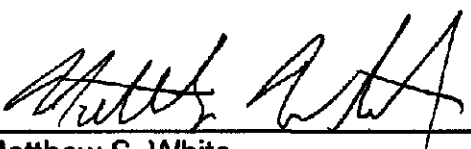
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